UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HAROLD R. AND PATRICIA A. SHERRELL	CASE NO. 89-00255
Debtors	Chapter 7

APPEARANCES:

HAROLD R. & PATRICIA A. SHERRELL
350 Electronic Parkway
Liverpool, New York 13088

CITY OF SYRACUSE
Office of Corporation Counsel
300 City Hall
Syracuse, New York 13202

JOSEPH R. PACHECO, II, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it by way of Order to Show Cause, dated January 31, 2000, a motion filed by Harold R. and Patricia A. Sherrell ("Debtors") *pro se*. While somewhat difficult to discern from the Debtors' papers, it appears, based on arguments made at a hearing held on March 7, 2000, in Syracuse, New York, that the Debtors are seeking a determination by the Court concerning whether the Debtors are liable for fines imposed on them by the City of Syracuse ("City") in connection with alleged code violations at 106 Elizabeth Street, Syracuse, New York ("Elizabeth Street Property")[1]. The Debtors argue that the fines were imposed on them in violation of § 362 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Debtors also

[1] The Elizabeth Street Property consisted of four one-bedroom apartment units.

contend that at the time the fines were imposed and judgments executed against them, the Elizabeth Street Property was under the control of Mary E. Leonard, Esq., the chapter 7 trustee ("Trustee"); therefore, the City should be restrained from enforcing its judgments against the Debtors. In addition, the Debtors seek a determination concerning (a) whether the City violated the automatic stay when it transferred real property at 131 Bellvue Avenue, Syracuse, New York ("Bellvue Avenue Property")[2] by tax deed recorded on March 28, 1989, and (b) whether the City violated the automatic stay when it transferred the Elizabeth Street Property by tax deed on July 30, 1997, and then demolished the building located thereon on September 17, 1997. Debtors request damages in the amount of $600,000, attorney's fees, court costs and punitive damages for "loss of income property destroyed and sold" by the City.

The matter was submitted for decision following the hearing on March 7, 2000.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1) and (b)(2)(O).

FACTS

The Debtors filed a petition pursuant to chapter 11 of the Code on February 15, 1989. The City was listed as a creditor in the case holding mortgages securing $35,000 on the Elizabeth

---

[2] The Bellvue Avenue Property consisted of two two-bedroom apartment units.

Street Property and $35,000 on the Bellvue Avenue Property. *See* Schedules A-2 of the Petition. As noted above, on March 28, 1989, the City recorded a tax deed transferring the Bellvue Avenue Property to the City. On or about March 6, 1991, the case was converted to chapter 7. By Order dated August 14, 1991, the Court granted the Debtors' request to reconvert the case to chapter 11 provided that they filed a plan and disclosure statement by October 15, 1991. Having failed to comply with this deadline, the case was again converted to chapter 7 on October 15, 1991, only to be reconverted to chapter 11 on November 21, 1991. On March 16, 1992, the City's Assistant Corporation Counsel, John G. Stone, Esq. filed an affidavit asserting that the City was a secured creditor with respect to two Community Development Block Grant Loans and objecting to the Debtor's disclosure statement. On motion by the U.S. Trustee, the case was again converted to chapter 7 by Order dated June 18, 1993. Mary E. Leonard, Esq. was appointed as chapter 7 trustee ("Trustee") on June 22, 1993. On March 4, 1994, the City filed a proof of claim in the amount of $43,295.07 and $36,922.74 in connection with the two loans on the Bellvue Avenue Property and the Elizabeth Street Property, respectively.[3] On December 14, 1995, the Trustee filed her no asset report.

Between October 1993 and May 1996 judgments totaling approximately $6,000 were filed against the Debtors by the City for alleged code violations in connection with the Elizabeth Street Property. On or about July 1, 1997, the City alleges that it mailed a letter to the Debtors at 55 Bayberry Circle, Liverpool, New York,[4] and at the Elizabeth Street Property notifying them that

---

[3] The proofs of claim were signed by the Commissioner of Community Development.

[4] At the time that the Debtors filed their petition, they resided at 55 Bayberry Circle. According to an application filed by the Debtors on June 11, 1997 ("June 1997 Application"), seeking an Order to Show Cause, the Debtors' residence was still 55 Bayberry Circle. However, the

the City was entitled to take title to the Elizabeth Street Property by tax deed as a result of delinquent taxes thereon. *See* Exhibit B of Answer/Affidavit in Opposition of Michael J. Auricchio, Assistant Corporation Counsel for the City ("Auricchio Affidavit").[5] The City took possession of the Elizabeth Street Property on July 30, 1997 pursuant to a Tax Sale Deed. *See* Exhibit C of Auricchio Affidavit. According to the City, it made thirteen separate inspections of the Elizabeth Street Property between February 1996 and September 1997 and found the building thereon unoccupied and vacant and open to entry. *See* Exhibit D at ¶ 2 of Auricchio Affidavit. It is the City's position that it presented a substantial risk to the neighborhood. Accordingly, the City demolished it on September 17, 1997.[6]

On October 15, 1997, the Trustee filed a Notice of Proposed Abandonment, returnable November 18, 1997, in Syracuse, New York. In spite of opposition filed by the Debtors, on

---

Debtors' affidavit of service in connection with the motion under consideration, filed February 7, 2000, lists an address of 350 Electronic Parkway, Liverpool, New York.

[5] The notices were apparently sent by certified mail. *See* Exhibit B of Auricchio Affidavit. The Court notes that in the June 1997Application, the Debtors acknowledged that approximately $44,635.72 was owing for property tax and penalties and or "finds"[sic] on the Elizabeth Street Property. *See* ¶ 13(b) of the June 1997Application. In the June 1997 Application, the Debtors sought to have the Trustee show cause why she should not be held liable for damages that allegedly had occurred to certain real property and personal property of the estate since her appointment in June of 1993. This included damages to the Elizabeth Street Property incurred allegedly as the result of neglect and vandalism and to the Bellvue Avenue Property as a result of unpaid real property taxes and penalties. By Letter Decision and Order, dated August 22, 1997, the Court, *inter alia*, granted the Debtors leave to commence litigation against the Trustee in another forum in the event that the Trustee chose to abandon the real property to the Debtors pursuant to Code § 554 or the case was closed and the real property deemed abandoned. (At the hearing on March 7, 2000, Mr. Sherrell indicated that he had not commenced any action against the Trustee to date.)

[6] According to the affidavit of George Napolitano, sworn to February 4, 2000, the property was demolished on September 17, 19**98**. *See* ¶ 6 of Exhibit D of Auricchio Affidavit.

November 24, 1997, the Court signed an Order granting the Trustee's request.

The Debtors were issued a discharge on July 30, 1998, and the case was closed on or about August 11, 1998. On January 28, 2000, the case was reopened at the request of the Debtors in order for them to file the motion presently under consideration.

ARGUMENTS

As an initial matter, the City contends that the Debtors' motion should be denied as a result of their failure to comply with various procedural rules. The City contends that because the Debtors seek to enjoin the City from collecting the various fines imposed against them in connection with the Elizabeth Street Property, they should have commenced an adversary proceeding. The City also asserts that the Debtors have failed to state whether the matter is core or non-core pursuant to Rule 7008(a) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") and have failed to identify the case's chapter and the Debtors' social security numbers as required by Local Rule ("L.R.") 9004-2. With respect to the matter having been brought by Order to Show Cause, the City points out that the Debtors have not given any indication whether a previous application had been made, as required by L.R. 9013-5(b) and have failed to include their address and telephone number as required by Fed.R.Bankr.P. 9011(a).

On a more substantive note, the City asserts that the tax sale deed on the Bellvue Avenue Property, which was recorded on March 28, 1989, did not violate the automatic stay. It is the City's position that at that time the City became the owner of the real property. With respect to the Elizabeth Street Property, the City contends that the Debtors have no standing to assert a

violation of the automatic stay because it was under the custody and control of the chapter 7 Trustee when the tax sale deed was recorded on July 30, 1997.

Contrary to the assertion by the City, the Debtors contend that the City violated the automatic stay when it recorded the tax sale deed on the Bellvue Avenue Property less than 45 days after the Debtors filed their bankruptcy petition. The Debtors also point out that in arguing that the Elizabeth Street Property was under the control of the Trustee, the City is acknowledging that the Debtors did not have control of it and, therefore, the imposition of fines against the Debtors in connection with the code violations was improper. Furthermore, the Debtors contend that the City should have sought relief from the automatic stay before demolishing the building located on the Elizabeth Street Property as it was not until some 114 days after the demolition that the property was abandoned by the Trustee back to the Debtors. The Debtors make the argument that the actions of the City with respect to both properties were wilful violations of the automatic stay in that the City knew or should have known of the Debtor's bankruptcy case as evidenced by its opposition to the Debtors' disclosure statement in 1992 and its filing of a proof of claim in 1994.

DISCUSSION

As this Court has previously noted in this case, "'Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training.'" *In re Sherrell*, Case No. 89-00255, slip op. at 6 (Bankr. N.D.N.Y. March 7, 1998),

quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983). Accordingly, the Court will consider the Debtors' motion in a more lenient light than might otherwise be the case where both parties are represented by counsel. *See Sherrell*, slip op. at 6, citing *In re Krautheimer*, 210 B.R. 37, 41 (Bankr. S.D.N.Y. 1997); *see also In re Barrows*, 171 B.R. 455, 459 (Bankr. D.N.H. 1994) (citations omitted). It is clear from the opposition filed by the City that it was provided notice of the relief being sought by the Debtors despite their failure to comply with the rules enumerated above.

The City contends that the Debtors should have commenced an adversary proceeding in connection with the relief being sought. According to Fed.R.Bankr.P. 7001(7), a request for injunctive relief generally should be sought in the context of an adversary proceeding. In light of the leniency with which *pro se* litigants are to be treated in connection with their pleadings, the Court finds no prejudice to the City in addressing the Debtors' request that it be enjoined from enforcing its judgments against the Debtors in connection with the code violations at the Elizabeth Street Property.[7]

Upon the filing of the Debtors' petition, all property in which the Debtors held an equitable or legal interest became property of the estate pursuant to Code § 541(a)(1). Upon conversion of the case to chapter 7 in June 1993, the Trustee became accountable for all property of the estate. According to § 27-114(a) of the City of Syracuse Property Conservation Code,

---

[7] At the hearing on March 7, 2000, the City's counsel offered to waive the fines and penalties levied against the Debtors in exchange for the Debtors' withdrawal of their motion. The Debtors declined to accept the offer and asked that the Court consider awarding the damages requested in their motion.

written notice of violation of the Property Conservation Code "or of any other state or local law, ordinance or regulation" enforced by the Division of City Code Enforcement requires written notice of the alleged violation "to the person or persons responsible for such violation." Upon her appointment on June 22, 1993, it was the Trustee's duty to preserve the property of the estate from deterioration or dissipation until said property was abandoned by the Trustee. *See In re Kids Creek Partners, L.P.*, 248 B.R. 554, 560 (Bankr. N.D.Ill. 2000); *see also In re Reich*, 54 B.R. 995, 1003 (Bankr. E.D. Mich. 1985) (noting that if a trustee has possession of the property he/she owes a duty to preserve it). The Trustee did not seek to abandon the Elizabeth Street Property until October 1997. At the time of the alleged violations between 1993 and 1996, the Trustee was in control of the Elizabeth Street Property and was the person to whom notice of the alleged code violations should have been given, not the Debtors. Therefore, pursuant to Code § 105, the Court concludes that the City should be enjoined from taking any action against the Debtors, including the enforcement of its judgments, in connection with the alleged code violations at the Elizabeth Street Property.

With respect to the Debtors' request for actual and punitive damages based on the City's alleged violation of the automatic stay with regard to both properties, Code § 362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). Although Fed.R.Bankr.P. 7001(1) indicates that an adversary proceeding should be brought to recover damages, several courts have concluded that the imposition of sanctions under Code § 362(h) may be sought by motion. *See In re Timbs*, 178 B.R. 989, 994 (Bankr. Bankr. E.D.Tenn. 1994) (citations omitted); *In re Hooker* Inv., 116

B.R. 375, 378 (Bankr. S.D.N.Y. 1990); In *re Forty-Five Fifty-Five, Inc.*, 111 B.R. 920, 923 (Bankr. D.Mont. 1990); *but see In re Wyatt*, 173 B.R. 698, 704 (Bankr. D.Idaho 1994) (stating that "an action to collect punitive damages for violation of the automatic stay should be an adversary proceeding.").[8] Accordingly, this Court will consider the relief requested in the Debtors' motion pursuant to Code § 362(h).

The Debtors filed their petition pursuant to chapter 11 of the Code on February 15, 1989. The City recorded its tax deed to the Bellvue Avenue Property almost six weeks later on March 28, 1989. The recordation and the transfer of the Bellvue Avenue Property by the City was a clear violation of the automatic stay. *See Plachotnik v. LaPolla (In re Plachotnik)*, Case No. 91-02173, Adv. Pro. No. 93-70098, slip op. at 10 (Bankr. N.D.N.Y. March 11, 1994). Actions taken in violation of the automatic stay are generally void. *Id.* at 11 (citations omitted); *In re Ferrante*, 195 B.R. 990, 993 (Bankr. N.D.N.Y. 1996) (citations omitted). This is true even thought the creditor may not have had actual notice of the stay. *Plachotnik*, slip op. at 11 (citations omitted).

Code § 362(d) authorizes the Court to retroactively validate actions that would otherwise be void provided the creditor did not have actual knowledge of the automatic stay, and it is determined that the creditor would be unfairly prejudiced. *See In re Lipuma*, 167 B.R. 522, 526 (Bankr. N.D.Ill. 1994). In connection with the motion now before the Court, the City states that "it is unclear whether the Housing Code Enforcement Division of the City even had knowledge

---

[8] The Court would note, however, that it need not consider the Debtors' request insofar as they seek punitive damages because they may not be assessed against a municipality. *See Sharapata v. Town of Islip*, 56 N.Y.2d 332, 338, 437 N.E.2d 1104, 1108, 452 N.Y.S.2d 347, 351 (N.Y.1982), citing *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 267, 101 S.Ct. 2748, 2760, 69 L.Ed.2d 616 (1981) (noting that "[d]amages awarded for punitive purposes * * * are not sensibly assessed against the governmental entity itself.").

that the Sherrells were even in bankruptcy . . . ." *See* ¶ 54 of Exhibit A of Auricchio Affidavit. The City was listed on the Debtors' Petition as a secured creditor with a mailing address of "City of Syracuse Community Development, City Hall, Syracuse, New York 13202." As noted above, in March 1992 the City's corporation counsel opposed the Debtors' disclosure statement, asserting that it was a secured creditor based on loans granted to the Debtors in connection with the rehabilitation of the two properties. In addition, the proof of claims filed in March 1994 and signed by the Commissioner of Community Development indicate that any notices were to be sent to the "City of Syracuse, Department of Law, 301 City Hall, Syracuse, New York 13202," which is the same address as found on the City's opposition to the Debtors' disclosure statement. The Auricchio Affidavit lists an address for corporation counsel of "300 City Hall, Syracuse, New York 13202."

The fact that the City is a governmental unit with several different divisions or departments does not shield its activities from the automatic stay. "Any entity, no matter how large or convoluted, must observe the automatic stay and the protections afforded the debtor thereunder. Congress created no exception under section 362 for inordinately complex entities of any sort whether public or private: All alike are bound by and must observe the automatic stay." *In re Stucka*, 77 B.R. 777, 783 (Bankr. C.D.Calif. 1987). In this instance, it appears that corporate counsel for the City had knowledge of the Debtors' bankruptcy case and their ownership interests in the two properties and, therefore, it would be inappropriate for the Court to retroactively validate the City's actions by annulling the stay *nunc pro tunc* pursuant to Code § 362(d).

Under the circumstances, however, the Court must also give consideration to the equitable

doctrine of laches by which a court may deny relief to a claimant "who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought." BLACK'S LAW DICTIONARY 879 (7th ed. 1999). It is a matter of the Court's discretion to apply the doctrine and requires more than an unreasonable delay; it also requires a showing of prejudice to the City in this case. *See Thornton v. First State Bank of Joplin*, 4 F.3d 650, 653 (8th Cir. 1993) (citation omitted); *In re Cutillo*, 181 B.R. 13, 15 (Bankr. N.D.N.Y. 1995).

In this case, approximately eleven years have elapsed since the City transferred the Bellvue Avenue Property by way of a tax deed in March of 1989. At the time, the Debtors were represented by counsel and were attempting to reorganize as debtors-in-possession under chapter 11. It was not until June 18, 1993, that the case was finally converted to chapter 7 and administration of the case was turned over to the Trustee. During that four year period, no action was taken by the Debtors to avoid the transaction and recover the Bellvue Avenue Property.[9]

According to the Debtors' schedules, the value of the Bellvue Avenue Property was estimated to be $70,000. At the time they filed their petition, there was approximately $43,295 owing on the Community Development Block Grant Loan. The Debtors' Schedule "A" lists a combined undisputed claim for property taxes of $9,500 on both the Bellvue Avenue Property and the Elizabeth Street Property. According to the Debtors' monthly profit and loss statements filed in the case, there were no rents being generated in connection with either property from at least April 1989 forward. There is no evidence that the Debtors ever made any effort to pay taxes on the property over the past eleven years to the detriment of the City. The Debtors should not

[9] It is not known whether the City ultimately sold the property to a third party.

be able to recover damages from the City after eleven years of sitting on their rights now that they have received a discharge of their unsecured prepetition debt in the chapter 7. Indeed, there is a real question whether the Debtors personally suffered any actual damages. It was not the Debtors' residence and there was no basis for the Debtors to claim an exemption in the property. Any equity that may have existed in the property, after payment to the City for property taxes and on the loan from the City, if the Debtors had succeeded in avoiding the transfer, would not have inured to the benefit of the Debtors but would have been available to pay their unsecured creditors. Under these circumstances, the Court concludes that under the doctrine of laches, it will deny the relief now being sought by the Debtors with respect to the Bellvue Avenue Property.

At the time that the building located on the Elizabeth Street Property was demolished on September 17, 1997, the property was still property of the estate since the Order granting the Trustee's proposed abandonment of it was not signed until November 24, 1997. *See generally In re Koeller*, 170 B.R. 1019, 1022 (Bankr. W.D.Mo. 1994) (noting that "[o]nce the real estate was abandoned by the Trustee, it was removed from the bankruptcy estate to [the Debtor] as though no bankruptcy occurred."). Code § 362(a)(3) stays any act to obtain possession of property of the estate or any act to exercise control over property of the estate. However, Code § 362(b)(4) provides an exception which allows governmental entities such as the City "to remain unfettered by the bankruptcy code in the exercise of their regulatory powers." *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988). In *In re Javens*, 107 F.3d 359 (6th Cir. 1997), the Court of Appeals affirmed the District Court's determination that acts taken by a city pursuant to its building and fire codes are excepted from the automatic stay "as measures in furtherance

of the public health, safety and welfare . . . ." *Id*. at 365. As noted by the City, the inspections of the Elizabeth Street Property revealed that the property was unoccupied and vacant and that such properties "are notorious for attracting criminal elements as well as pose a constant nuisance to the surrounding property owners as a likely target for arson and other dangerous and potentially life-threatening activities." *See* ¶ 3 of Exhibit D of Auricchio Affidavit. Under those circumstances, the Court concludes that the demolition of the building located on the Elizabeth Street Property by the City did not violate the automatic stay and, accordingly, the Debtors' motion seeking damages in this regard is denied.

Based on the foregoing, it is hereby

ORDERED that the Debtors' motion seeking to enjoin the City from collecting on its judgments filed against the Debtors in connection with the alleged code violations on the Elizabeth Street Property is granted; it is further

ORDERED that the Debtors' motion seeking actual and punitive damages pursuant to Code § 362(h) based on the City's alleged wilful violation of the automatic stay with respect to the Bellvue Avenue Property is denied; and it is finally

ORDERED that the Debtors' motion seeking actual and punitive damages pursuant to Code § 362(h) based on the City's alleged wilful violation of the automatic stay with respect to the Elizabeth Street Property is denied.

Dated at Utica, New York

this 28th day of August 2000

STEPHEN D. GERLING

Chief U.S. Bankruptcy Judge